IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

NO. 75-6766

CARL ALBERT COLLINS ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO CERTIORARI

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OPINION BELOW

The Opinion of the Supreme Court of Arkansas is reported at 259 Ark. 8, 531 S.W.2d 13 and reprinted in the appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I

Whether the death sentence imposed on the petitioner pursuant to a statute enacted subsequent to this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) is constitutional.

II

Whether electrocution is a permissible form of capital punishment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States and statutes of Arkansas involved are set forth in the Petition at pp.2-6.

STATEMENT OF THE CASE

The petitioner, Carl Albert Collins, was charged by information with capital felony murder in violation of Ark. Stat. Ann. §41-4701 et seq. (1973 Pocket Supp.) After a trial by jury the appellant was found guilty of capital felony murder. The jury after hearing evidence of aggravating and mitigating circumstances found that the death sentence should be imposed.

The evidence produced at trial showed that while working for Mr. and Mrs. Welch the petitioner attempted to rob Mrs. Welch who yelled for help. Mr. Welch, who was working outside came to the aid of his wife, who was in their house with petitioner. When Mr. Welch entered the house the petitioner picked up a shotgun which belonged to Mr. Welch and shot him once. After murdering Mr. Welch the petitioner took the money that was in Mr. Welch's billfold, left the scene of the crime and was subsequently captured in Tennessee.

Petitioner appealed his conviction and sentence to the Arkansas Supreme Court. His conviction was affirmed by that Court. *Collins v. State*, 259 Ark. 8, 531 S.W.2d 13.

ARGUMENT

The issues for this Court in this Petition are not new. The Petitioner was convicted of a capital felony for the commission of a murder during the robbery. The petitioner seeks review upon a claim that his death sentence violates the Eighth and Fourteenth Amendments to the Constitution of the United States as interpreted in *Furman,* supra. Respondent submits that the statute under which the petitioner was convicted and sentenced to die by electrocution is constitutional.

The petitioner also presents the argument that the use of electrocution as a means of carrying out capital punishment is unconstitutional. Respondent submits that the use of electrocution as a means of carrying out the death sentence is not in violation of any provision of the Constitution of the United States.

I

THE DEATH PENALTY PROVISION OF ARK. STAT. ANN. §41-4701 ET SEQ. DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES.

The petitioner contends that the decision in *Furman v. Georgia,* 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) made any death penalty statute unconstitutional:

> ". . . if the sentencing authority possessed the uncontrolled discretion to inflict the death penalty versus some lesser punishment . . ." (Petitioner's Brief, p. 10)

The respondent disagrees with this interpretation and contends that *Furman,* supra, only prohibits the death penalty when the jury is given no guidance on when to impose the death penalty.

The decision in *Furman v. Georgia,* supra, did not rule death penalty per se unconstitutional. The exact holding of the 5 to 4 decision in *Furman,* supra, was:

> "The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." U.S. at 239-240, L. Ed. 2d at 350 (Emphasis added).

The five justices who joined in the Per Curiam Order each wrote separate opinions and none of them concurred in the opinion of the other. The four dissenting justices filed separate opinions but did join in each others opinions.

Of the five justices in the majority only Justice Brennan and Marshall found that the death penalty was per se unconstitutional.

The other three justices in the majority seem to base their decision to find the death penalty unconstitutional in the cases before them on the ground that there was no legislative guidance on when the death penalty should be imposed. Justice Douglas noted:

> "We deal with a system of law and of justice that leaves the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12." *Furman,* supra. U.S. at 253, L. Ed. 2d at 357.

Justice Douglas went on to state:

> "Thus these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible

with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Furman*, supra, U.S. at 256-257, L. Ed. 2d at 359.

Mr. Justice Stewart in *Furman*, supra, stated:

"I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." U.S. at 310, L. Ed. 2d at 390.

Justice Stewart indicated that the death penalty could serve the legitimate penal purpose of retribution. Mr. Justice Stewart said:

"... I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment ...When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law." *Furman*, supra, U.S. at 308, L. Ed. 2d at 389.

The respondent contends that Ark. Stat. Ann. §41-4701, et seq. would pass constitutional muster by Mr. Justice Stewart since the law narrows the crimes for which the death penalty is possible and sets definite standards to be used in determining when to impose death, thereby lessening the opportunity that it will be "wantonly and so freakishly imposed." The State of Arkansas would also point out that Mr. Justice Stewart was a member of the majority in *McGautha v. California*, 402 U.S. 183, 28 L. Ed. 2d 711 (1971), and did not expressly reject its holding in his opinion in *Furman*, supra.

Another justice joining in the majority in *Furman*, supra, was Mr. Justice White to find the statutes in *Furman*, supra, unconstitutional. The State submits that a reasonable reading of Mr. Justice White's opinion reveals that its gravamen was that under the statutes before this Court in *Furman*, supra, the juries were given unfettered discretion in imposing the death penalty. In support of this theory the respondent respectfully directs the Court's attention to two passages in Mr. Justice White's opinion in *Furman*, supra:

First: "The narrow question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorized the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decision as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist." U.S. at 311, L. Ed. 2d 390-391.

Second: "I add only that past and present legislative judgment with respect to the death penalty looses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative 'policy' is thus necessarily defined not by what is legislatively

authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them." U.S. at 314, L. Ed. 2d 392.

In addition to the above statements the respondent in support of its contention that Justice White does not oppose all forms of jury sentencing in death penalty cases respectfully points out that he was a member of the majority in *McGautha,* supra.

The highest courts in several other states have been called on to pass on the constitutionality of capital punishment statutes enacted after *Furman,* supra. The State of Arkansas points out those cases where the new statute was struck down. The respondent will not discuss those but would direct this Court's attention to those cases upholding the constitutionality of the new statutes.

In *Jurek v. State,* 522 S.W.2d 934, Ct. Cr. App.(Tex. April 16, 1975), the Court in upholding the statute similar to Ark. Stat. Ann. §41-4701 et seq. (Supp. 1973) stated:

> "Some discretion is inherent and desirable in any system of justice, from arrest to final judgment. . . . The mere presence of discretion in the sentencing process does not render that procedure violative of *Furman.* It is rather the quality of discretion and the manner in which it is applied that must be controlled. To eliminate all discretion on the part of the jury would be to risk elimination of that valuable element which permits individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence. If discretion in the assessment of punishment under a statute can be shown to be reasonable and controlled, rather than

> capricious and discriminatory, the test of *Furman* will be met." (Footnote omitted)

The Supreme Court of Georgia in *Coley v. State,* 204 S.E.2d 612, 231 Ga. 829 (1974), upheld the constitutionality of a capital punishment statute that permitted limited discretion. In *Coley,* supra, the Court noted:

> "The states are free, we must conclude, to provide a new system short of mandatory application [of the death penalty]. . . .
>
> . . . The essential question is not whether our new death statute permits the use of some discretion, because admittedly it does, but, rather, whether the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application. . . . Logically, it is not discretion per se which must be condemned, but it is unguided discretion that does not 'produce evenhanded justice.' " S.E.2d at 615-616.

A statute almost identical to Ark. Stat. Ann. §41-4701 et seq. (Supp. 1973) was held constitutional in *State v. Dixon,* 283 So. 2d 1 (Fla. 1973). The Court pointed out that:

> "The mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia,* supra; it was, rather, the quality of discretion and the manner in which it applied that dictated the rule of law which constitutes *Furman v. Georgia,* supra. *Dixon,* supra, at 6."

The respondent submits that the provisions of Ark. Stat. Ann. §41-4701 et seq. meet constitutional standards in that it eliminates the imposition of the death penalty on a "wantonly and freakishly" basis; the jury is no longer left

to "its own discretion" in determining what cases deserve capital punishment.

The saving features of Ark. Stat. Ann. §41-4701 et seq. (Supp. 1973) are contained in §§41-4710, 41-4711, and 41-4712. The important parts of §41-4710 are:

> (c) In the proceeding to determine sentence, evidence may be presented as to any matters relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 11 [§41-4711] and 12 [§41-4712] of this act. The State and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.
>
> (d) After hearing all the evidence as to sentence, the jury shall again retire and render a sentence based upon the following:
>
> (i) whether beyond a reasonable doubt sufficient aggravating circumstances, as enumerated in Section 11 [§41-4711] of this act, exist to justify a sentence of death;
>
> (ii) whether sufficient mitigating circumstances as enumerated in Section 12 [§41-4712] of this act exist to justify a sentence of life imprisonment without parole.
>
> (e) The jury in rendering its verdict shall set forth in writing its findings as to each of the aggravating or mitigating circumstances enumerated in Sections 11 [§41-4711] and 12 [§41-4712] hereof and shall set forth in writing its conclusion:

> (i) that sufficient aggravating circumstances (do or do not) exist beyond a reasonable doubt to justify a sentence of death;
>
> (ii) that there are (or are not) sufficient mitigating circumstances to outweigh the aggravating circumstances.

A review of this section, when read together with §§41-4711 and 4712 shows that the jury is given a great deal of guidance in reaching the answer of what punishment to impose, and under this section a jury can only "violate its trust and statutory policy" by improperly imposing or not imposing the death penalty in a particular case.

The jury is given a list of the aggravating circumstances that they should consider by §41-4711 and were instructed only to consider these circumstances in determining aggravation. (Tr. 267). The jury also hears circumstances that can constitute mitigation brought to their attention. In addition to these circumstances listed in §41-4712 the jury was informed that they could list and consider any other mitigating circumstance or circumstances they wished. (Tr. 270).

The respondent contends that a jury in Arkansas by following the procedure of §41-4710 may constitutionally impose a sentence of death. "The selectivity of juries in imposing the punishment of death [should] properly [be] viewed as a refinement of, the statutory authorization for the penalty. Legislatures prescribe the categories of crimes for which the death penalty should be available, and, acting as "the conscience of the community," juries are entrusted to determine the individual cases that the ultimate punishment is warranted." Per Chief Justice Burger, dissenting, *Furman*, supra, U.S. at 388.

The fact that in this case the jury imposed the death penalty shows that they followed the intent of the legislature. The jury found that only the appellant's age was a mitigating circumstance (Tr. 32), while beyond a reasonable doubt the circumstances of a prior felony involving the use or threat of violence had been committed, that the capital felony was committed for pecuniary gain, and that in commission of the capital felony a great risk of death was created for another person in addition to the victim. (Tr. 30). The jury certainly was correct in deciding that the appellant should be sentenced to death.

II

PETITIONER'S DEATH SENTENCE DOES NOT VIOLATE HIS FUNDAMENTAL RIGHT TO LIFE AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The petitioner urges that this Court adopt the position that the death penalty is unconstitutional under the due process clause of the Fourteenth Amendment because life is a fundamental right which cannot be taken unless the state can show that the death penalty fulfills a "compelling state interest" and is the "least restrictive means" of protecting that interest. *Shapiro v. Thompson*, 394 U.S. 618, 634; 22 L. Ed 2d 600, 615; 89 S. Ct. 1322 (1969) and *Griswold v. Connecticut*, 381 U.S. 479, 485; 14 L. Ed. 2d 510, 515; 85 S. Ct. 1678 (1965).

"It is the duty of the Courts to resolve all doubts in favor of the legislative action and to sustain it unless it appears to be clearly outside the scope of reasonable and legitimate regulation." *Carter v. State*, 255 Ark. 225, 231; 500 S.W.2 368 (1973) cert. denied, 416 U.S. 905 (1974) at

231. "It requires a strong showing to upset [a] settled practice of the nation on constitutional grounds, *McGautha*, supra, U.S. at 203, L. Ed. 2d at 724.

The respondent submits that petitioner's argument fails to show why any doubts concerning the death penalty should be resolved in his favor on the grounds urged by him. The respondent contends that an equally logical argument can be made that the imposition of the death penalty was implicitly authorized by the Constitution. As noted in the dissenting opinion of Chief Justice Burger, in *Furman*, supra:

> ". . . it is . . . clear from the language of the Constitution itself that there was no thought whatever [at the time of its adoption to] the elimination of capital punishment.
>
> "The opening sentence of the Fifth Amendment is a guarantee that the death penalty not be imposed 'unless on a presentment or indictment of a Grand Jury.' The Double Jeopardy Clause of the Fifth Amendment is a prohibition of being 'twice put in jeopardy of life' for the same offense. Similarly, the Due Process Clause commands 'due process of law' before an accused can be 'deprived of life, liberty, or property.' Thus the explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment; it does not expressly or by implication acknowledge the legal power to impose any of the various punishments that have been banned as cruel since 1971. Since the Eighth Amendment was adopted on the same day in 1791 as the Fifth Amendment, it hardly needs more to establish that the death penalty was not 'cruel'

in the constitutional sense at that time." U.S. at 380, L. Ed. 2d 430-431.

The respondent urges this Court to find that petitioner has failed to show that the due process clause of the Fourteenth Amendment precludes the death penalty.

If this Court wishes to consider the claim that the death penalty offends the due process clause of the Fourteenth Amendment unless the State can meet the "compelling state interest-least restrictive means" test the respondent urges it to adopt the following reasons as grounds for approving the death penalty.

One of the primary purposes for government is to provide for the "protection" and "security" of the people. Article 2, §1, Ark. Const. of 1874. One of the reasons the union of States was formed was to "insure domestic tranquility," Preamble to the Constitution of the United States. The State, therefore, has the duty to protect its citizens from being killed by those people who will not abide by the laws of the land. It does have a compelling state interest in assuring that its citizens are not put to death by those members of society that have no regard for the lives of others. Mr. Welch, the victim, had every right to expect that he would not be shot — gunned to death during a robbery. The State, therefore, does owe its citizens the duty to take those actions necessary to minimize the likelihood that their life will be prematurely terminated by the criminal actions of another person. In providing for the "protection" and "security" of the people the legislature exercises its inherent police powers. The police power allows the legislature, ". . . within constitutional limitations, [to] prohibit all things hurtful to the comfort, safety and welfare of the people and prescribe regulations to

promote the public health, morals and safety." *Carter*, supra, 255 Ark. at 231.

In enacting Ark. Stat. Ann. §41-4701 et seq. (Supp. 1973) the legislature acting as the voice of the people determined that in a limited number of instances, but specific instances, to approve the imposition of death to satisfy the penal goals of retribution and deterrence.

The State of Arkansas submits that, since the "protection" and "security" of society is a duty of government, the State may choose to impose the death penalty for those limited crimes it is logically suited for and thereby comply with the requirement of due process clause that the statute fulfill a "compelling state interest."

The respondent takes the position that the death penalty as applicable under Arkansas law is the "least restrictive means" of protecting society.

Ark. Stat. Ann. §41-4702 (Supp. 1973) lists the crimes for which the death penalty can be imposed. A review of those crimes shows that they are of the character which require an overt act that generally requires preparation to commit or actions which evidence a total disregard for human life. The crimes for which the death penalty now can be imposed are not the type that can be committed on the spur of the moment in the heat of passion. The deterrent effect of the death penalty is recognized and because death could be perceived by most potential law breakers as the maximum feasible penalty it probably would be an effective deterrent in those situations where the crime involves pre-planning and thought. "*Prima facie* the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment

. . . ." Royal Commission on Capital Punishment, 1949-1953 Report, paragraph 61 (1953).

In the article, the Deterrent Effect of Capital Punishment: A Question of Life and Death; The American Economic Review, June, 1975, the author concluded for each execution per year over the period studied "may have resulted, an average, in 7 or 8 fewer murders." p. 414.

The deterrent effect of capital punishment was noted by Justice McComb in his dissent in *People v. Love*, 366 P. 2d 33, 41-42 (1961) in which were listed the following statements taken from the Records of the Los Angeles Police Department:

(i) Margaret Elizabeth Daly, of San Pedro, was arrested August 28, 1961, for assaulting Pete Gibbons with a knife. She stated to investigating officers: "Yeh, I cut him and I should have done a better job. *I would have killed him but I didn't want to go to the gas chamber.*"

(ii) Robert D. Thomas, alias Robert Hall, an ex-convict from Kentucky; Melvin Eugene Young, alias Gene Wilson, petty criminal from Iowa and Illinois; and Shirley R. Coffee, alias Elizabeth Salquist, of California, were arrested April 25, 1961, for robbery. They had used toy pistols to force their victims into rear rooms, where the victims were bound. When questioned by the investigating officers as to the reason for using toy guns instead of genuine guns, all three agreed that real guns were too dangerous, *as if someone were killed in the commission of the robberies, they could all receive the death penalty.*

(iii) Louis Joseph Turck, alias Luigi Furchiano, alias Joseph Farino, alias Glenn Hooper, alias Joe Moreno, an ex-convict with a felony record dating from 1941, was

arrested May 20, 1961, for robbery. He had used guns in prior robberies in other states but simulated a gun in the robbery here. He told investigating officers that he was aware of the California death penalty although he had been in this state for only one month, and said, when asked why he had only simulated a gun, *"I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber."*

(iv) Ramon Jesse Velarde was arrested September 26, 1960, while attempting to rob a supermarket. At that time, armed with a loaded .38 caliber revolver, he was holding several employees of the market as hostages. He subsequently escaped from jail and was apprehended at the Mexican border. While being returned to Los Angeles for prosecution, he made the following statement to the transporting officers: "I think I might have escaped at the market if I had shot one or more of them. *I probably would have done it if it wasn't for the gas chamber.* I'll only do 7 or 10 years for this. I don't want to die no matter what happens, you want to live another day."

(v) Orelius Mathew Stewart, an ex-convict with a long felony record, was arrested March 3, 1960, for attempted bank robbery. He was subsequently convicted and sentenced to the state prison. While discussing the matter with his probation officer, he stated: "The officer who arrested me was by himself, and if I had wanted, I could have blasted him. *I though about it at the time, but I changed my mind when I thought of the gas chamber.*"

(vi) Paul Anthony Brusseau, with a criminal record in six other states, was arrested February 6, 1960, for robbery. He readily admitted five holdups of candy stores in Los Angeles. In this series of robberies he had only

simulated a gun. When questioned by investigators as to the reason for his simulating a gun rather than using a real one, he replied that *he did not want to get the gas chamber*.

(vii) Salvador A. Estrada, a 19-year-old youth with a four-year criminal record, was arrested February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officers: "I want to ask you one question, do you think they will repeal the capital punishment law. *If they do, we can kill all you cops and judges without worrying about it.*"

(viii) Jack Colevris, a habitual criminal with a record dating back to 1945, committed an armed robbery at a supermarket on April 25, 1960, about a week after escaping from San Quentin Prison. Shortly thereafter he was stopped by a motorcycle officer. Colevris, who had twice been sentenced to the state prison for armed robbery, knew that if brought to trial he would again be sent to prison for a long term. The loaded revolver was on the seat of the automobile beside him and he could easily have shot and killed the arresting officer. By his own statements to interrogating officers, however, *he was deterred from this action because he preferred a possible life sentence to death in the gas chamber*.

(ix) Edward Joseph Lapienski, who had a criminal record dating back to 1948, was arrested in December, 1959 for a holdup committed with a toy automatic type pistol. When questioned by investigators as to why he had threatened his victim with death and had not provided himself with the means of carrying out the threat, he stated, *"I know that if I had a real gun and killed someone, I would get the gas chamber."*

(x) George Hewlitt Dixon, an ex-convict with a long felony record in the East, was arrested for robbery and kidnapping committed on November 27, 1959. Using a screwdriver in his jacket pocket to simulate a gun, he had held up and kidnapped the attendant of a service station, later releasing him unharmed. When questioned about his using a screwdriver to simulate a gun, this man, a hardened criminal with many felony arrests and at least two known escapes from custody, indicated his fear and respect for the California death penalty and stated, *"I did not want to get the gas."*

(xi) Eugene Freeland Fitzgerald, alias Edward Finley, an ex-convict with a felony record dating back to 1951, was arrested February 2, 1960, for the robbery of a chain of candy stores. He used a toy gun in committing the robberies, and when questioned by the investigating officers as to his reasons for doing so, he stated: "I know I'm going to get the joint and probably for life. *If I had a real gun and killed someone, I would get the gas. I would rather have it this way.*"

(xii) Quentin Lawson, an ex-convict on parole, was arrested January 24, 1959, for committing two robberies, in which he had simulated a gun in his coat pocket. When questioned on his reason for simulating a gun and not using a real one, he replied that *he did not want to kill someone and get the death penalty*.

(xiii) Theodore Roosevelt Cornell, with many aliases, an ex-convict from Michigan with a criminal record of 26 years, was arrested December 31, 1958, while attempting to hold up the box office of a theater. He had simulated a gun in his coat pocket, and when asked by investigating officers why an ex-convict with everything to lose would

not use a real gun, he replied, *"If I used a real gun and shot someone, I could lose my life."*

(xiv) Robert Ellis Blood, Daniel B. Gridley, and Richard R. Hurst were arrested December 3, 1958, for attempted robbery. They were equipped with a roll of cord and a toy pistol. When questioned, all of them stated that they used the toy pistol because *they did not want to kill anyone, as they were aware that the penalty for killing a person in a robbery was death in the gas chamber.*

The respondent submits that the allegation that the death penalty does not have a deterrent effect should be rejected by this Court. The number of violent crimes per 100,000 has increased as the number of executions have decreased. Starting in 1960 the number of executions has steadily decreased from fifty-six in that year to zero each year from 1968 to present. See: Capital Punishment: 1973, National Prisoner Statistics, U.S. Department of Justice, (March, 1975), Table 1 at 16. During the period 1960 to 1973 the percentage increase in the rate of murder and non-negligent manslaughter per 100,000 inhabitants increased 86.0 percent. See: Uniform Crime Reports: Crime in the United States — 1973; U.S. Department of Justice, Federal Bureau of Investigation, Table 2 at 59.

Justice White in *Furman,* supra, noted his general agreement with the principal that the death penalty could have a deterrent effect. He stated:

> "For present purposes I accept the morality and utility of punishing one person to influence another. I accept also the effectiveness of punishment generally and need not reject the death penalty as a more effective deterrent than a lesser punishment." U.S. at 312, L. Ed. 2d at 391.

The State of Arkansas thinks that it is completely reasonable to believe that the certain prospect that the commission of a crime could result in execution deters at least some persons from committing those crimes which carry the death penalty. The use of life imprisonment does not logically have the same effect because the person can reasonably believe that at some date in the future he will be able to obtain release from prison due to the granting of executive clemency by the governor.

The respondent, therefore, takes the position that the death penalty by more effectively preventing murder than other forms of punishment meets the "least restrictive means" test.

The issue of the due process clause requirements of the Fourteenth Amendment were presented to this Court in *McGautha,* supra, and it concluded:

> "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases if offensive to anything in the Constitution." 402 U.S. at 207, 28 L. Ed. 2d at 726.

Respondent urges this Court to reject petitioner's claim that his Constitutional rights were violated by a death sentence and deny his petition for a writ of certiorari.

III

THE CONSTITUTION OF THE UNITED STATES DOES NOT PROHIBIT THE USE OF ELECTROCUTION AS A METHOD OF EXECUTION.

The respondent takes the position that electrocution is a permissible method of execution.

The use of electrocution as the means of execution in Arkansas has existed since 1913. Ark. Stat. Ann. §43-2611 (Repl. 1964). Between 1930 and 1964 a total of 118 persons were executed in Arkansas. During the period 1960 to 1964 a total of nine persons were executed in Arkansas. See Capital Punishment: 1973, supra. Table 2 p. 19. Petitioner's statement on pages 104-105 of his brief that there has only been "one execution in Arkansas in almost 15 years" is incorrect. The use of electrocution as the means for execution in Arkansas has long been accepted and has been used, therefore, it cannot be said that it is clearly a "cruel and unusual" punishment prohibited by Article 2, §9 of the Arkansas Constitution. This Court should apply its normal standard, "that a statute long in existence, under which many cases have been prosecuted and its validity inferentially sustained, should not be held invalid except for very cogent reasons" and thereby reject appellant's claim that electrocution is constitutionally impermissible.

The State of Arkansas further takes the position that petitioner's argument that electrocution offends the Eighth Amendment is without solid constitutional support.

This Court has never given any indication that electrocution is a prohibited form of execution. The petitioner seeks to rely on the conclusions of those who have witnessed electrocution to support a factual claim that it

is a "cruel and unusual" form of punishment. The respondent asserts that this form of argument is more properly presented in a trial where a full record can be developed as to the correctness of these conclusions.

This Court "has never had to hold that a mode of punishment authorized by a domestic legislature was so cruel as to be fundamentally at odds with other basic notions of decency." *Furman,* supra, U.S. at 385, L. Ed. 2d 433. The legislature expressing the will of the people has chosen electrocution as the method of execution in Arkansas. ". . . [I]n a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society, . . .[and should] only be negated by unambiguous and compelling evidence of legislative default." *Furman, id.*

This Court should find that the petitioner has failed to prove that electrocution offends the "standards of decency" of the community and that, therefore, the "cruel and unusual" punishment clause of the Eighth Amendment does not prevent appellant's execution by electrocution.

CONCLUSION

For the above reasons, a writ of certiorari should be denied.

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